

DOCKET HHD-CV-11-6027112-S	:	SUPERIOR COURT
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LUKE WEINSTEIN	:	J. D. OF HARTFORD
	:	AT HARTFORD
VS	:	
	:	
UNIVERSITY OF CONNECTICUT,	:	
ET AL.	:	JUNE 30, 2022

**MEMORANDUM OF DECISION**

A court trial was held in this aged and complex employment case on April 19, 20, 21, 26, 27 and 28, May 3, 4, 5, 17 and 20, 2022, concluding with closing arguments on June 21, 2022. The parties filed posttrial briefs on June 10, 2022, with proposed findings of fact and conclusions of law (#353.00 and #354.00). The plaintiff is Luke Weinstein, a former employee of the University of Connecticut (UCONN), who served as the Director of the Innovation Accelerator (IA) and an Assistant Professor in Residence (APIR) in the School of Business' Management Department, from January 2007 to August 22, 2011.<sup>1</sup> The defendants are UCONN and Paul Christopher Earley (Dean Earley), the former dean of the School of Business from 2008-2011. Before the court is the sole remaining claim in the case brought pursuant to the Connecticut whistleblower statute, General Statutes § 31-51m (count two).<sup>2</sup> Although originally

<sup>1</sup> Although this was a combined position with one salary, the plaintiff's position as IA Director was terminated by Dean Earley as of August 22, 2010, by way of a letter dated July 28, 2010. His employment as an APIR continued, however, through August 22, 2011, his effective termination date. See Plaintiff's Exhibits 27 & 48.

<sup>2</sup> The other three counts, all disposed of in the course of this litigation, alleged a violation of General Statutes § 31-51q (count one), a violation of the first amendment pursuant to 42 U.S.C. § 1983 (count three), and intentional interference with advantageous business

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commenced in this court with service of process on November 14, 2011, this case was removed to the United States District Court for the District of Connecticut (federal district court), on December 9, 2011, by the defendant. It was ultimately remanded to this court on May 3, 2016. A detailed history of the proceedings in the federal district court is recounted in an expansive ruling filed on May 18, 2021, on the defendants' motion for summary judgment #271. See Corrected Memorandum of Decision Re: Motion for Summary Judgment #319 (*Noble, J.*).

The evidence before this court consists of the testimony of the plaintiff; Luke Weinstein; John Mathieu, former head of the UCONN Management Department; Richard N. Dino (Dino), the former Associate Dean of the School of Business and Executive Director of the Connecticut Center for Entrepreneurship and Innovation (CCEI); Mohammed "Mo" Hussein, former head of the Management Department; Kimberly Fearney, former Assistant Director and Director of the Office of Audit Compliance and Ethics (OACE) commencing in 2011 and current Chief Compliance Officer for UCONN since 2018; Rachel Rubin, creator of the OACE in 2006 and its Director until 2011; Linda Klein, Associate Dean of the School of Business for five years, from 2006 to May, 2011; Dean Earley, the Dean of the School of Business, from approximately January, 2008 to September, 2011; Brian Rozental, a former master's of business administration (MBA) student at UCONN assigned to the Sustainable Community Outreach and Public Engagement (SCOPE) Accelerator in 2010, doing field research, which included conducting interviews of Special Olympics' athletes; and

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relationship (count four).

Arthur Wright, Ph.D economist and the plaintiff's damages expert. Included in the numerous exhibits filed by the parties were the depositions of Peter Nicholls (Nicholls or the Provost), UCONN Provost, and Nancy Bull (Bull), UCONN Assistant Provost, completed in 2013, which were submitted in lieu of trial testimony.<sup>3</sup>

The sole issue before the court is whether the plaintiff has proved, by a preponderance of the evidence, that the defendants retaliated against him in violation of § 31-51m, by not renewing his appointment as an APIR in the Management Department of the UCONN School of Business on May 20, 2011. See Plaintiff's Exhibit 48. The plaintiff seeks the relief afforded by the statute including reinstatement, back wages, reestablishment of employee benefits, attorney's fees and costs.

As noted by Judge Noble, this case has been the subject of multiple decisions of the federal district court for the District of Connecticut, the Second Circuit Court of Appeals and the Connecticut Superior Court.<sup>4</sup>

The court adopts and restates the following conclusions of law as made previously by Judge Noble in this case:

<sup>3</sup>

Several of the witnesses held multiple positions within UCONN. The positions used to identify them herein, for the most part, are the positions they held during the period of the plaintiff's employment at UCONN.

<sup>4</sup>

*Weinstein v. University of Connecticut*, United States District Court, Docket No. 3:11CV1906 (WWE), 2015 WL 13634341, \*3 (D. Conn. August 28, 2015) ("Weinstein I"); *Weinstein v. University of Connecticut*, 136 F. Supp. 3d 221, 229 (D. Conn. 2016) ("Weinstein II"), aff'd in part, vacated in part, remanded, 676 F. Appx. 42 (2d Cir. 2017) ("Weinstein III"); *Weinstein v. Earley*, United States District Court, Docket No. 3:11CV1906 (WWE), 2017 WL 4953901, \*2 (D. Conn. November 1, 2017) ("Weinstein IV"), aff'd sub nom, *Weinstein v. University of Connecticut*, 753 F. Appx. 66 (2d Cir. 2018) ("Weinstein V").

1. The word discipline as used in §§ 31-51m and 31-51q means “any adverse material consequence relative to a right, term, condition or benefit of employment that existed at the time of the protected [activity].” In addition, this court finds that the term penalize as used in § 31-51m, includes an adverse employment action, including nonrenewal of a renewable employment contract. Further, nonrenewal, particularly under the circumstances of this case is, in effect, a discharge.

2. The OACE is a public body within the meaning of § 31-51m, as are UCONN employees (i.e. Rubin, Earley, Nicholls, Bull and Klein).

3. This action was timely commenced by service of process on the defendants on November 14, 2011, within the applicable limitation period of ninety days as mandated by § 31-51m (c).

Although the defendants’ counsel have claimed that Judge Noble’s decision limited his finding on § 31-51m to retaliation for complaints about nepotism only, the body of the decision and the section of it addressing § 31-51m (count two), states no limitation. For this reason, the court finds that the singular reference in the conclusion regarding nepotism, and the exclusion of the labor and Institutional Review Board (IRB) complaints, is simply an unintentional error of omission. In any event, as the defendants’ counsel noted at final argument, it is not a major issue whether the claimed retaliation was based on nepotism or labor complaints, or both.

In a summary of the various decisions that had been made by the federal courts to the date of his decision, Judge Noble determined that the plaintiff’s claims of protection afforded by § 31-51m were not addressed. Those claims include retaliation

for complaints made in the spring of 2010, alleging expressed concerns about labor law violations, IRB violations and nepotism, involving Dean Earley and his spouse, Dr. Elaine Mosakowski, a full professor with tenure in the Management Department of the School of Business.

#### FINDINGS OF FACT

The facts are substantially undisputed by the parties. Nonetheless, for the sake of clarity, the court finds that the following facts have been established by a preponderance of the evidence.

UCONN is an employer as defined in § 31-51m (2). It is also a public body within the meaning of § 31-51m (4). The plaintiff is an employee as defined in § 31-51m (3).

The plaintiff earned his Ph.D in marketing and management from the UCONN School of Business in 2008. As he neared completion of his Ph.D requirements, the plaintiff sought an academic appointment. He received an offer for a tenure-track position at Kent State University, and was in discussions with three other universities, when Dino approached him about a position as an APIR, with administrative duties as IA Director at UCONN. At the time, Dino was the Executive Director of the CCEI and Associate Dean of the School of Business. The IA is an experiential learning center designed to afford students the opportunity to work with early stage high technology start-up companies that was just being established as part of the CCEI. The CCEI was funded by a \$2 million annual block grant, but UCONN did not treat those funds as only available to the CCEI. Upon inquiry by the plaintiff, Dino assured the plaintiff that he

would have job security as long as his performance was satisfactory and funding was available, in accordance with the terms of his renewable contract.

The plaintiff was appointed on January 17, 2007, and reappointed on May 15, 2008 and June 24, 2009, to the position of "Director of the Innovation Accelerator and Assistant Professor In-Residence in the Management Department of the School of Business." The appointment letters provided that "the position is subject to annual renewal and may be renewed subject to the availability of funding and your continued satisfactory performance. This appointment does not lead to academic tenure." See Plaintiff's Exhibits 10, 12, 14, and 21. The position had a single job description and a single annual salary. The plaintiff had a teaching load for each term of his appointment that was not to exceed three courses. The position of IA Director involved reaching out to Connecticut entrepreneurs and soliciting clients as well as responsibility for handling the administrative aspects of the IA. The plaintiff's appointment as an APIR brought his position within the Collective Bargaining Agreement (CBA).

When the plaintiff started his position in 2007, he reported to John Mathieu, Head of the Management Department. Dean Earley was hired in January, 2008 to serve as the Dean of the School of Business and his wife, Dr. Elaine Mosakowski, was hired as a tenured professor in the Management Department at the same time Earley was hired as Dean.

The plaintiff had almost no interactions with Dean Earley until spring 2010. At that time, Dean Earley sought to implement changes in the School of Business which impacted the compensation structure of students in the IA. Dean Earley's plan was for

students to receive fellowships instead of wages as W-2 employees, such that students would no longer be covered by worker's compensation. The plaintiff was concerned about the impact of these changes on students and the functioning of the IA and questioned whether the changes may be in violation of labor laws. The plaintiff communicated his concerns to others in the School of Business, which came to Dean Earley's attention. In an e-mail dated May 10, 2010, addressed to the plaintiff and with other administrators and faculty in the School of Business copied as recipients, Dean Earley wrote, "I don't want to hear yet again about the labor law issue or the fellowship . . . I'm getting rather tired of roadblocks thrown up that I have addressed and I see it as counterproductive to what we are trying to achieve." Plaintiff's Exhibit 18r. Despite this admonishment from Dean Earley, on May 28, 2010, the plaintiff sent another e-mail to department heads in the School of Business, Dr. Mosakowski, other faculty and Dean Earley's assistant, Nancy Toomey, stating that he wanted to be sure that "we stop violating federal [labor] laws."

Also, around the same time in the spring of 2010, the plaintiff raised concerns to those in leadership positions about suspected violation of IRB regulations, which had the potential to negatively impact grant funding from the federal government. The plaintiff stated that the School of Business had provided inaccurate or misleading information by stating that IRB approval was not necessary for students conducting research during the summer, when IRB regulations mandated otherwise. The plaintiff was proven to be correct in his interpretation of the IRB regulations relating to the necessity of obtaining approval for student's performing summer research.

In addition to the labor law and IRB issues raised, the plaintiff also reported concerns to Rubin and the OACE regarding Dean Earley and Dr. Mosakowski, including: (1) that the SCOPE Accelerator, of which Dr. Mosakowski was director, violated IRB regulations by interviewing underage Special Olympics athletes, who suffer from qualifying disabilities, without first seeking IRB approval or parental consent forms. This circumstance was confirmed at trial by a former graduate student, Brian Rozental, who testified that he observed that these interviews took place; (2) that Dean Earley used his position as Dean to confer financial benefits upon Dr. Mosakowski, his spouse, relating to her position as the head of the SCOPE Accelerator.

The plaintiff ultimately reported the aforementioned violations or suspected violations of the law beyond the School of Business to the OACE and its director, Rachel Rubin. After first reporting his concerns orally to Rubin, the plaintiff sent an e-mail with attachments on May 25, 2010, to Rubin and the OACE, detailing the previously raised issues involving violations of labor laws and IRB regulations. See Plaintiff's Exhibit 18r. Around the same time, in May, 2010, Rubin testified that the plaintiff complained to her orally about the nepotism issues related to Dean Earley and Dr. Mosakowski. Rubin further stated that she believed that the plaintiff made these complaints in good faith. The OACE did not investigate the plaintiff's whistleblowing complaints.

The OACE was established at UCONN as the office responsible for receiving reports of compliance concerns, advising employees about compliance issues and investigating compliance inquiries. Although the OACE has no enforcement authority,

it has the mandate to investigate compliance issues arising under the UCONN Code of Conduct and the State Code of Ethics. The OACE has the mandate to provide protection and support to employees who may experience retaliation. See Plaintiff's Exhibit 3.

UCONN's Code of Conduct provides that any employee who observes a possible violation of law, regulation, policy or approved procedure was obligated to report such violation to the OACE. See Plaintiff's Exhibit 1. The UCONN Code of Conduct has a conflict of interest provision that specifically bars an employee from using his or her position for personal financial gain or for the financial benefit of a family member or domestic partner. It also has a specific nonretaliation provision which states that any violations should be reported immediately to the "Compliance Office," presumably the OACE. The UCONN Code of Ethics states that employees who have questions regarding provisions or "who would like assistance in contacting the Office of State Ethics, should contact the University's Ethics Liaison Officer." See Plaintiff's Exhibit 2. The Code of Ethics lists Rubin as UCONN's Ethics Liaison.

Rubin was also provided and was aware of other complaints of nepotism. Mathieu met with Rubin, on May 24, 2010, to explain his growing concern about nepotism and conflict of interests concerning Dr. Mosakowski and Dean Earley and what he perceived as retaliatory behaviors on the part of Dean Earley. Mathieu testified that Dr. Mosakowski did a number of things that were contentious including seeking a grant for summer compensation of \$20,000 that was not in the School of Business' budget. Dino was concerned that her request did not meet the grant criteria. She

involved herself in a promotion and tenure case that became contentious and resulted in pressure being exerted by Dean Earley in the form of a request to the Promotions and Tenure Review Committee to take another look. Dino became concerned that opposition to Dr. Mosakowski would result in retaliation from Dean Earley. The review committee for the grant decided to treat Dr. Mosakowski's request like any other one and rejected it, which prompted Dean Earley to seek an explanation as to why it was rejected. Dr. Michael Lubatkin, a highly regarded scholar, was chair of the faculty review committee that rejected Dr. Mosakowski's proposal. He was subsequently accused by Dean Earley of violating some off campus policy. Dean Earley also intervened in a research funding request by Lubatkin. This occurred immediately after Dr. Mosakowski's grant application was rejected. When Dr. Mosakowski was hired, she reported directly to Mathieu, and as an initial effort to avoid conflicts of interest with Dean Earley, Mathieu reported salary related matters and other compensation issues concerning her directly to the Provost, not Dean Earley. Mathieu, otherwise, reported directly to Dean Earley.

Mathieu believed that there were issues of retaliation and nepotism involving Dean Earley and Dr. Mosakowski that would not go away. He came to believe that anyone involved with CCEI was being retaliated against by Dean Earley when Management Department members took an adverse view to Dr. Mosakowski on numerous contentious issues. Mathieu, himself, was subjected to a last minute critical performance evaluation by Dean Earley in the Summer of 2010 and was ultimately not renewed as Head of the Management Department. Mathieu testified that he believed

that Dean Earley's negative evaluation of him was retaliatory. Mathieu also testified that Rubin told him that she brought the nepotism concerns to the Provost, but that the Provost just stared back at her and did not respond. Ultimately, on June 24, 2010, Rubin sought informal advice from the State Office of Ethics on the nepotism issue involving Dean Earley and Dr. Mosakowski. See Plaintiff's Exhibits 25 & 28.

On June 3, 2010, the plaintiff was reappointed to the position of APIR in the Management Department of the School of Business for the period of August 23, 2010 to August 22, 2011. His teaching load requirement was noted as seven courses, which was standard for in-residence faculty. The reappointment letter further noted that, "[t]his position does not lead to permanent academic tenure but it may be renewed annually depending upon performance, funding and relevance to the academic mission." At that time, he was not reappointed as IA Director because the School of Business had implemented a new process concerning the appointment of directors that was not yet complete. Based on the language of the June 3, 2010 reappointment letter, the plaintiff had a reasonably probable expectation that his contract would be renewed.

Mathieu was more than satisfied with the plaintiff's performance as a teacher based on his work from 2008 through 2010. The often quoted statement made by Mathieu about the plaintiff not being hired as a teacher was not intended as a criticism of him. He felt that the traditional APIR position has lesser requirements than the IA Director position for which the plaintiff was recruited and hired.

The plaintiff's reappointment as an APIR, on June 3, 2010, did not include reappointment as IA Director. Around that time, the School of Business implemented a

new process for hiring directors of the CCEI accelerators. In 2010, a search process was initiated for the IA Director and along with all other directorships within the School of Business, was "subject to an open call for nominations (including self nominations)." Dino nominated the plaintiff to continue as IA Director. Provost Nicholls testified at his deposition that he believed there was miscommunication by Dean Earley to the School of Business faculty concerning the new search process to be employed. In the case of the plaintiff, a search yielded no other qualified candidate.

On July 19, 2010, a meeting was held with Dean Earley, Rubin, Dino, Mathieu, Klein, Bull, Eagen and the plaintiff to discuss the plaintiff's potential reappointment as the IA Director. Dean Earley stated that given the plaintiff's previous performance, he had no discomfort whatsoever inviting the plaintiff to fill the IA Directorship again and that he was very comfortable with a two-year appointment subject to funding and performance, which would be annually renewable. Dean Earley also stated that the plaintiff needed to decide if he want to continue given the new structure and advised the plaintiff to communicate with George Plesko. Dean Earley did not indicate that the plaintiff still needed to submit a curriculum vitae (CV).

After seeking clarification from Plesko, the plaintiff told Mathieu and Dino that he wanted to continue as IA Director and would make the IA the best success he possibly could under the new structure. Dino thereafter relayed the plaintiff's intention and desire to continue as the IA Director to Klein and Dean Earley. Dean Earley did not respond to Dino and did not inform him that a CV was still necessary if he wished to continue as IA Director.

In an e-mail to the plaintiff on June 21, 2010, Dean Earley wrote to the plaintiff about the necessity of going through the search process for the IA Director position. In that e-mail Dean Earley stated: "I understand that you were nominated by someone for the IA Directorship (Nancy will solicit from you a current cv and cover letter), so if you are recommended by the review committee and selected you'd be offered a multi-year contract for the position." Plaintiff's Exhibit 24, p. 4. Bull was copied on that e-mail and wrote back to Dean Earley on June 22, 2010, with copies to the plaintiff, Dino, Mathieu and Klein, stating that what Dean Earley wrote in his e-mail was accurate except for the two-year contract, stating further: "The offer letter will be for one year with the opportunity to *automatically* renew for a second year based on performance and funding." (Emphasis added.) In response to Dean Earley's e-mail, the plaintiff also responded on June 22, 2010, with copies to Dino, Mathieu, Klein, Rubin and Ed Marth (AAUP), stating that he would "love to find a way to continue as IA Director." See Plaintiff's Exhibit 24, pp. 2-4.

Klein was on the review committee for the applications to the IA. She testified that the committee did not consider the plaintiff to be an active candidate because he did not submit the "required materials." There were no other candidates for the position of IA Director. Nonetheless, Klein testified that the plaintiff's nomination was deemed incomplete and not considered. The only other "material" that has been identified as required was a CV. The plaintiff's CV was well known to the School of Business as he completed his graduate work and Ph.D there, and had worked as the IA Director and an APIR since January 2007, with outstanding results. All the other CCEI directors were

reappointed and there was no other candidate for the plaintiff's position. Neither the plaintiff, nor Dino, were informed that the plaintiff's CV was essential to having his candidacy considered. Sometime later on, Dean Earley offered the position of IA Director to Brian Brady, even though Brady's faculty appointment in the IA was not continued because Brady was not regarded as an effective mentor.

In a letter dated July 28, 2010, Dean Earley informed the plaintiff that he would not be reappointing him as IA Director. Among the stated reasons was that the plaintiff failed to submit the "requisite letter of interest and CV and provide specific assurances to me that you were will and able to embrace the new program design. To this date, you have not submitted the requested materials. More importantly, the School has significant doubts regarding your commitment or 'buy in' to the new program design. . . . I am concerned that your view strongly expressed during the July 19<sup>th</sup> meeting referring to the new accelerator program as a sinking ship of which you were captain remains . . . ." See Defendants' Exhibit I.

On July 30, 2010, the plaintiff notified Rubin that Dean Earley had not reappointed him as IA Director. He told Rubin that he believed that he had suffered retaliation for his whistleblowing activities and he wanted her to investigate. The plaintiff followed up by sending Rubin documents regarding his nonreappointment as IA Director. He also sent her the e-mails referenced in Dean Earley's July 28, 2010 letter and challenged her to find anything that Dean Earley could have been referring to. See Plaintiff's Exhibit 27. Rubin subsequently told the plaintiff that he should file a Commission on Human Rights and Opportunities (CHRO) complaint, even though

UCONN's Code of Conduct and policies prohibited retaliation for reporting legal and compliance concerns. Rubin never took any action to investigate the plaintiff's claim of retaliation. Rubin's advice to the plaintiff to go to the CHRO indicates that she understood his claims to concern retaliation.

On September 10, 2010, the AAUP initiated a grievance on behalf of the plaintiff (Step 1 Grievance). See Plaintiff's Exhibit 33. A Step 1 conference was held on November 5, 2010, attended by Klein, as designee for Dean Earley, Ed Marth, Executive Director of UCONN AAUP, the plaintiff and Michael Eagen, a labor and employment attorney from the UCONN Department of Human Resources. The grievance arose out of Dean Earley's failure to reappoint the plaintiff as IA Director on July 28, 2010. The plaintiff alleged in part that the decision not to reappoint him was in retaliation for having engaged in the protected activity of "whistleblowing." Klein took extensive notes at the hearing and e-mailed them to Earley on November 10, 2010. She also arranged for Dean Earley's assistant, Nancy Toomey, to send all the documents submitted by the plaintiff by express mail to Dean Earley. See Plaintiff's Exhibit 35. Klein also met with Dean Earley to go over her notes and told him that the plaintiff's complaints about nepotism related to him and Dr. Mosakowski.

On December 2, 2010, an e-mail response with the subject line, Step 1 "Grievance Response," rejecting the grievance, was e-mailed to Marth and the plaintiff, finding that "it was motivated by important concerns unrelated to any alleged whistle blowing." Plaintiff's Exhibit 37. The decision came from Dean Earley and Klein. Klein testified that Dean Earley made the decision. Even though she understood that the

plaintiff was claiming retaliation by Dean Earley, Klein did not investigate the plaintiff's claim of retaliation for whistleblowing, nor refer it to OACE for investigation. She testified that she left it up to Dean Earley or Eagen to report the retaliation claim for investigation.

Between November 10, 2010 and December 2, 2010, Dean Earley received information that the plaintiff had previously reported violations or suspected violations to the OACE and others including: (1) the decision not to reappoint him as IA Director was retaliation for whistleblowing activities, including complaints about nepotism; (2) he complained to OACE about the necessity of IRB approval for students doing summer research; (3) he complained about SCOPE interviews with Special Olympics athletes being held without IRB approval; (4) he complained to Rubin on May 25, 2010, about labor law issues after Dean Earley told him he did not want to hear any more about it; and (5) he sent a recording of Dean Earley laughing about the number of hours students worked in the IA, but could not talk about it because of labor laws. See Plaintiff's Exhibit 18r.

On November 16, 2010 and November 17, 2010, Dr. Mosakowski and Dean Earley, respectively, were required to sign a memorandum of agreement between them, the OACE, the Provost, and the Dean of the School of Pharmacy, designed to address the issues of nepotism that had arisen between Dr. Mosakowski, as a tenured faculty member in the School of Business within the Management Department, and Dean Earley. Dean Earley admitted in his trial testimony that this agreement reduced Dr. Mosakowski's ability to participate normally in Management Department affairs. See

Plaintiff's Exhibit 36.

In December, 2010, the AAUP appealed the Step 1 Grievance decision to Provost and requested a specific ruling on the portion of the grievance that alleged retaliation for whistleblowing. See Plaintiff's Exhibit 38. Based on e-mails and the testimony of Nicholls and Bull, neither was aware of who was responsible for handling claims of retaliation for whistleblowing. Id. Rubin testified that neither Nicholls or Bull made a referral to OACE about the plaintiff's claim of retaliation. The duty to report complaints of retaliation by employees, under the UCONN Code of Conduct, arises upon the mere possibility of retaliation. Dean Earley, the person against whom the plaintiff made claims of retaliation, according to Klein, his Associate Dean, was the decisionmaker who denied the plaintiff's Step 1 Grievance concerning retaliation for Dean Earley's failure to reappoint him as IA Director. That is, the same person against whom the plaintiff claimed retaliation for whistleblowing was the person who decided there was no merit to his claim.

Neither Dean Earley, Klein, Nicholls, Bull or Rubin caused any investigation to be made on the plaintiff's whistleblowing complaints despite the clear mandates of the UCONN Code of Ethics, Code of Conduct and OACE. In his deposition testimony, Nicholls testified that he agreed in principle that it was not appropriate for the person against whom a claim of retaliation was made to be the decision maker on the issue of the retaliation.

In the 2010-2011 academic year, the plaintiff continued as an APIR. He taught required management courses for students majoring in management and required

courses for students minoring in entrepreneurship. He also published a full length article in a refereed journal although APIRs are not required to publish. He served as a mentor and advisor to students. In August, 2010, he received the mentor of the year award. In April, 2011, he mentored a winning team of students in a statewide competition and also mentored two of the three winning student teams at the CCEI business plan competition that offered monetary awards. The plaintiff was recommended by Hussein for merit pay at the conclusion of the 2010-2011 academic year. His performance was consistently better than satisfactory. The courses he taught were relevant to the academic mission. He was highly regarded by his supervisors, Mathieu, Dino and Hussein, and highly rated by students as a teacher. The plaintiff met all the criterial for reappointment as an APIR in 2011-2012.

On April 14, 2011, Dean Earley sent an e-mail regarding a hiring freeze which exempted APIRs. Although the plaintiff had not yet been notified by Dean Earley that his APIR appointment would not be renewed for 2011-2012, in a letter dated May 20, 2011, Dean Earley stated that the letter was "to confirm" that the plaintiff would not be reappointed to that position. See Plaintiff's Exhibit 48. The decision not to reappoint the plaintiff as an APIR had actually been made by Dean Earley as of January 7, 2011, as evidenced by Plaintiff's Exhibit 45, which noted in the "Budget Comments" of a job posting for a new director of the CCEI, that "[t]hree positions would not be renewed from FY 12 onwards (Brady, *Weinstein & Gilson*) \$426k." (Emphasis added.)

Renewals of APIRs were typically decided within the department to which they were assigned. It was unusual for the School of Business to make a decision about the

renewal or nonrenewal of an APIR without input from the department head. In the case of the plaintiff, it was Hussein, who was the (Interim) Head of the Management Department after Mathieu. The faculty chose Mathieu to continue as Head, but Dean Earley overruled them. No one else in the department was willing to take the interim position because they were upset. At the time of the plaintiff's nonrenewal as an APIR, Hussein was not consulted by Dean Earley and told the plaintiff he was sorry he was nonrenewed. Dino testified that in all his experience in the School of Business, including several years as an associate dean, the Dean had never interjected himself in the process of renewing an APIR before Dean Earley decided on his own not to renew the plaintiff. In Dino's experience, the only risk to nonrenewal was performance. Given the need for faculty in the management department during this time period, it was illogical that Dean Earley would intervene in the reappointment process for an APIR, other than to retaliate against the plaintiff for his whistleblower activity. The plaintiff was the only APIR who wanted to continue that Dean Earley nonrenewed without discussing it first with his department head.

On May 31, 2011, the AAUP filed a grievance on the plaintiff's behalf arising out of the failure to renew him as an APIR. The grievance alleges retaliation following the series of events that gave rise to the previous grievance that was still waiting to be heard at the Provost's level. See Plaintiff's Exhibit 51. On August 18, 2011, Vice Provost Bull issued a decision on the combined grievances, without holding any hearing. As basis for her decision concerning the APIR grievance, she found that the plaintiff was assigned to teach all elective courses in 2010-2011, rather than required

courses, a statement that has no basis in actual fact. See Plaintiff's Exhibit 56. In her deposition, Bull admitted that she did not know whether the courses the plaintiff was scheduled to teach were electives or required courses. Bull also stated that four of the five departments within the School of Business lost faculty and she did not realize that the Management Department was losing faculty for required courses in an area the plaintiff was qualified to teach. Bull's statement that the decision was made not to reappoint plaintiff because there were more critical needs in finance and accounting is belied by the hiring of Brady as an instructor-in-residence in the management department. Her further explanation that the plaintiff was not reappointed based on an analysis of competing needs and priorities is contrary to the reason Dean Earley testified to that there was no decisionmaking process when it came to the plaintiff's reappointment because there was no line in the budget. Bull named Klein as the source of the false information, in May, 2011, that the plaintiff was only teaching electives. By then, however, Klein had left the School of Business as Associate Dean before the second grievance had even been filed. Thus, Klein had no involvement in the second grievance and could not have been the source of the information about the plaintiff teaching electives. In her deposition, Bull stated that retaliation may or may not have been a variable in the decision not to reappoint the plaintiff as an APIR.

Dean Earley was not a credible witness on multiple issues including: whether he received and reviewed the documents presented at the November 5, 2010 grievance hearing sent to him by Klein, which would have included the May 25, 2010 e-mail from the plaintiff raising the IRB issues relating to student summer employment and SCOPE

involvement with the Special Olympics; and whether he actually reviewed the attachments submitted by the plaintiff in support of the IA Director grievance before issuing the decision denying the grievance. Dean Earley flipfopped in his testimony about whether he actually received or reviewed the documents from one day of testimony to the next.

Dean Earley also provided conflicting and unreliable testimony about Dr. Mosakowski's actual title when he proposed that she be designated Executive Director of SCOPE and the number of course reductions she received. He first claimed she had one course reduction but later admitted she received two course reductions. Dean Earley falsely testified that CCEI funds could not be used for other departments or purposes. He testified that his discussions with Nicholls, Bull and Rubin in 2010 relating to nepotism were just about general concerns and not related to him and his wife. This testimony is belied by the fact that he and his wife were required to enter into a written agreement in November, 2010, specifically addressing issues of nepotism. Dean Earley denied knowing that Lubatkin was involved in the decision to deny his wife's request for research funding at the time Dean Earley criticized him for violating a university policy about being off campus. At one point during trial, Dean Earley denied that he was ever made aware of the complaints that the plaintiff brought to Rubin concerning student hours, the IRB and potential nepotism. Yet he knew about these complaints at least by November, 2010. At that time, Klein reviewed her notes of the grievance hearing with him and he supposedly reviewed the documents submitted by the plaintiff at the grievance hearing so he could write the grievance response dated

December 2, 2010.

Further, Dean Earley, as the person who was the subject of a complaint concerning whistleblowing, should not have determined the outcome of the Step 1 Grievance which included a complaint of retaliation as a result of the whistleblowing by the plaintiff, as this violates UCONN's Code of Conduct and the State Code of Ethics. The Provost and the Assistant Provost were mandated to report suspected violations of whistleblowing to the OACE and request an investigation. Rubin, as Director of the OACE, was mandated to conduct an investigation or refer the investigation to the State Office of Ethics. None of these individuals investigated or requested an investigation of the plaintiff's whistleblowing complaints.

Dean Earley testified at trial that no one made the decision to not reappoint the plaintiff as an APIR stating that there was no budget line. This testimony is not credible. There were funds in the budget to support the plaintiff's appointment beyond 2010-2011. See Exhibit 45. In order to realize the budget savings of \$426,000 reflected in the foregoing exhibit by nonrenewing the plaintiff and two others, there had to be money in the budget in the first place. The plaintiff was already in an APIR position and the April 14, 2011 e-mail noted that the hiring freeze did not apply to APIRs. As confirmed by Nicholls in his 2013 deposition, it was "just one pot of money" and money could be used for different purposes. In fact, CCEI funds had been transferred to the Dean's account in the 2011-2012 academic year to pay for the cost of management department faculty who taught entrepreneurship that year. After having previously nonrenewed Brady, the School of Business hired him an Instructor in Residence in the

CCEI, a position that required mentoring even though Brady was regarded as a poor mentor. Although the plaintiff was far more qualified for the position, the position was not offered to the plaintiff. The position was paid from the Dean's budget. APIRs interested in renewal typically become long-term faculty members.

Thereafter, in Step 2, the grievance claiming retaliation by Dean Earley for failure to reappoint the plaintiff as an APIR for 2011-2012, Bull essentially adopted Dean Earley's decision in Step 1. See Plaintiff's Exhibit 56.

### CONCLUSIONS

Section 31-51m (b) prohibits an employer from discharging, disciplining, or otherwise penalizing an employee because (1) the employee reported a violation or suspected violation of a law, regulation, or ordinance to a public body.<sup>5</sup> General Statutes § 31-51m (b) (1). This claim is analyzed under the framework first established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *Arnone v. Enfield*, 79 Conn. App. 501, 506-07, cert. denied, 266 Conn. 932 (2003).

"In an action under § 31-51m (b), [the] plaintiff has the initial burden under *McDonnell Douglas Corp.* . . . of proving by a preponderance of the evidence a prima facie case of retaliatory discharge. This consists of three elements: (1) that [the

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General Statutes § 31-51m (b) provides in relevant part that "[n]o employer shall discharge, discipline or otherwise penalize any employee because . . . the employee, or a person acting on behalf of the employee, reports, verbally or in writing, a violation or a suspected violation of any state or federal law or regulation or any municipal ordinance or regulation to a public body . . . ."

plaintiff] engaged in a protected activity as defined by § 31-51m (b); (2) that [the plaintiff] was subsequently discharged from his employment; and (3) that there was a causal connection between his participation in the protected activity and his discharge. Once the plaintiff has made a prima facie showing of a retaliatory discharge, the defendant is obligated to produce evidence that, if taken as true, would permit the conclusion that there was a nonretaliatory reason for the termination of employment. If the defendant provides a legitimate and nonretaliatory reason for the discharge, the plaintiff must offer some significantly probative evidence showing that the defendant's proffered reason is pretextual and that a retaliatory intention resulted in his discharge." (Citations omitted; internal quotation marks omitted.) *Arnone v. Enfield*, supra, 79 Conn. App. 506-07. There is nothing in our case law that limits the type of circumstantial evidence that may be used to establish the plaintiff's prima facie case in a discrimination or retaliation action. See *Craine v. Trinity College*, 259 Conn. 625, 640-41, 791 A.2d 518 (2002).

#### A. Prima Facie Case

##### 1. Public Body

As stated previously, this court adopts Judge Noble's finding that the OACE and its employees constitute a "public body" under the statute, however, the defendants re-raised the argument in their posttrial brief, such that the court will address it again now. The defendants argue in their posttrial brief that the plaintiff did not report to a public body under the statute: that § 31-51m requires the employee's complaints to be lodged with an agency outside or external to his employer. The defendants argue that

while the OACE at UCONN constitutes a public body as defined under § 31-51m, the plaintiff's internal complaints to the OACE, as opposed to an external agency outside of UCONN, does not fall within the protection of § 31-51m.

There is nothing in the legislative history that provides that the public body must be external or different from the plaintiff's employer when that employer itself is a public body. Section 31-51m offers protection to those who report violations or suspected violations to a "public body." Public body is defined as any public agency or employee thereof, as defined by "public agency" in subdivision (1) of General Statutes § 1-200. General Statutes § 31-51m (a) (4). As a public institution of higher education, UCONN is a public agency under General Statutes § 1-200, et seq.<sup>6</sup> UCONN is a public agency, and is therefore, a public body under the statute, as is the OACE. Rubin, as Director of the OACE, is an agent of a public body and therefore, constitutes a public body under the statute as well.

The defendants rely on several cases to argue that the whistleblowing must be made to an external third party, however, all of the defendants' cases refer to internal

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Providing public education is a basic governmental function. *Board of Trustees v. Freedom of Information Commission*, 181 Conn. 544, 554, 436 A.2d 266 (1980). UCONN is an arm of the State. *Banerjee v. Roberts*, 641 F. Supp. 1093, 1098 (D. Conn. 1986); see also General Statutes § 10a-102. UCONN was established by article eight, § 2 of the Connecticut constitution which states:

The state shall maintain a system of higher education, including The University of Connecticut, which shall be dedicated to excellence in higher education. The general assembly shall determine the size, number, terms and method of appointment of the governing boards of The University of Connecticut and of such constituent units or coordination bodies in the system as from time to time may be established.

reporting to a private employer or nonpublic body. See *Wright v. Cornell Scott Hill Health Center, Corp.*, Superior Court, judicial district of New Haven, Docket No. CV-12-6031077-S (April 1, 2013, *Mullins, J.*) (55 Conn. L. Rptr. 792, 793) (“the plaintiff made her complaint internally, rather than to a public body” [emphasis added]). In *Chenarides v. Bestfoods Banking*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-03-0197877-S (March 30, 2005, *Hiller, J.*), which the defendants refer to extensively, the employee reported fraud internally to their private employer. The defendants’ cases are therefore distinguishable. Indeed, the distinction between public and private employers has been explicitly stated in *Gorian v. Board of Education*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-14-6020994-S (April 24, 2015, *Povodator, J.*). “[W]ith respect to governmental entities, the internal vs. external reporting distinction implicates considerations that differ from those applicable to private employers . . . .” *Id.*

Unlike the cases cited by the defendants, in the present case, the plaintiff did not report internally to a private business or corporation. Further, while the defendants have repeatedly referred the court to *Ritz v. East Hartford*, 110 F. Supp. 2d 94 (D. Conn. 2000), this reference undermines the defendants’ arguments because that court held that § 31-51m covers internal whistleblowing where the complaint was made to an individual who acts as an agent of the public body and his actions constitutes the actions of the body. On the underlying motion to dismiss in *Ritz*, the court considered “whether ‘internal whistleblowing’ by a public employee is covered by Connecticut’s Whistleblower Act.” *Ritz v. East Hartford*, United States District Court, Docket No.

3:97CV01863 (GLG) (D. Conn. March 18, 1998). In denying the defendants' motion to dismiss, the court held "the person within the public agency to whom plaintiff reported was the chief executive officer and had responsibility for supervision of the agency." Id. The court also noted that "[p]ublic schools and boards of education are public agencies . . . and, thus, fall within the definition of a 'public body' under . . . § 31-51m (a) (4) (A)." Id. The district court also stated that it had previously "determined that a rule protecting internal whistleblowing made 'sense.'" Id.

Apart from serving as the Director of the OACE, Rubin was also UCONN's Ethics Liaison Officer with the Office of State Ethics, an arm of the state government which does have enforcement authority. As the liaison, Rubin is clearly an individual who acts an agent or employee of a public body, within the meaning of § 31-51m. Thus, the plaintiff has proved by a preponderance of the evidence that he reported violations or suspected violations, both verbally and in writing, to a public body, the defendants in this case.

Accordingly, the plaintiff has established the first two elements of his whistleblowing claim under § 31-51m.

## 2. Causation

One of the principal issues in this case focuses on causation, that is, whether the nonrenewal of the plaintiff as an APIR was retaliatory on the part of the decision maker and appointing authority, Dean Earley. In the defendants' memorandum on questions of law to be decided by trial judge (#340.00) and the defendants' posttrial brief (#354.00), the defendants argue that the plaintiff cannot establish a prima facie case under §

31-51m (b) because he cannot prove by a preponderance of the evidence a causal connection between his raising concerns of nepotism [and presumably labor law and IRB issues] in May, 2010, and his nonreappointment to the APIR position in May, 2011. The defendants argue that the court should apply the “but for” standard of causation announced in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 133 S. Ct. 2517, 186 L. Ed. 2d 503 (2013), when analyzing whether the plaintiff is able to establish their prima facie case. The United States Supreme Court in *Nassar* held that a plaintiff claiming retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., must establish that the defendant’s retaliatory motive was the “but for” cause of his termination. *Id.*, 362. The defendants note that Connecticut looks to federal precedent for guidance in interpreting state antidiscrimination and antiretaliation statutes; *Eagen v. Commission on Human Rights & Opportunities*, 135 Conn. App. 563, 583, 42 A.3d 478 (2012); and argue that § 31-51m is similar to the Title VII retaliation provision.

The Connecticut Supreme Court is the ultimate authority on interpreting Connecticut statutes; *Johnson v. Manson*, 196 Conn. 309, 319, 493 A.2d 846 (1985), cert. denied, 474 U.S. 1063, 106 S. Ct. 813, 88 L. Ed. 2d 787 (1986); including our fair employment practices statutes. *Vollemans v. Wallingford*, 103 Conn. App. 188, 928 A.2d 586 (2007), aff’d, 289 Conn. 57, 956 A.2d 579 (2008). “Connecticut is the final arbiter of its own laws.” (Citation omitted; footnote omitted; internal quotation marks omitted.) *Vollemans v. Wallingford*, supra, 199-200. Connecticut appellate courts, however, have yet to resolve whether the “but for” standard announced in *Nassar* or the

traditional “motivating factor” standard applies in retaliation cases, including those pursuant to § 31-51m.

History of Other State Law Retaliation Cases

This court has previously found “compelling reasons to believe that our state appellate courts would not choose to follow the ‘but for’ causation standard articulated by the United States Supreme Court in . . . *Nassar* and *Gross* [v. *FBL Financial Services, Inc.*, 557 U.S. 167, 129 S. Ct. 2343, 174 L. Ed. 2d 119 (2009)] . . . in connection with . . . state . . . retaliation statutes.” *Bissonnette v. Highland Park Market, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-10-6014088-S (January 28, 2014, *Peck, J.*). The *Bissonnette* case involved a claim of retaliation for the exercise of rights under the Family and Medical Leave Act (FMLA) and Workers’ Compensation Act. The Superior Court in *Consiglio v. Montano Cigarette, Candy & Tobacco, Inc.*, Superior Court, judicial district of New Haven, Docket No. CV-12-6027652-S (January 27, 2014, *Wilson, J.*), also rejected utilizing the “but for” standard set forth in *Nassar* to a General Statutes § 31-290a claim, which prohibits employers from discharging employees for filing a claim for workers’ compensation benefits. “[T]he court elects not to follow *Nassar*, and the plaintiff may therefore establish causation by presenting evidence that a retaliatory motive played a part in the adverse employment action.” (Internal quotation marks omitted.) *Consiglio v. Montano Cigarette, Candy & Tobacco, Inc.*, supra, Superior Court, Docket No. CV-12-6027652-S, citing *Mele v. Hartford*, 270 Conn. 751, 776, 855 A.2d 196 (2004). In cases involving § 31-290a, the Appellate Court has recently stated that the causal

connection element under *McDonnell Douglas* may be established when “a retaliatory motive played a part in the adverse employment action.” (Emphasis omitted; internal quotation marks omitted.) *Desmond v. Yale-New Haven Hospital, Inc.*, 212 Conn. App. 274, 288, - A. 3d - (2022); *Barbee v. Sysco Connecticut, LLC*, 156 Conn. App. 813, 819, 114 A.3d 944 (2015).

In *Gross*, the United States Supreme Court held that “a plaintiff bringing a disparate-treatment claim pursuant to the [federal Age Discrimination in Employment Act (ADEA)] must prove, by a preponderance of the evidence, that age was the ‘but-for’ cause of the challenged adverse employment action.” *Gross v. FBL Financial Services, Inc.*, *supra*, 557 U.S. 180. Nevertheless, the Connecticut Appellate Court recently held that the reasoning in *Gross* “simply does not apply” to claims brought under the Connecticut Fair Employment Practices Act (CFEPA), General Statutes § 46a-60 (a) et seq. *Wallace v. Caring Solutions, LLC*, Appellate Court, Docket No. 43975, advance release opinion, to be officially released on July 5, 2022.<sup>7</sup> “[O]ur Supreme Court and this court repeatedly have held that the applicable causation standard under CFEPA is the motivating factor test. . . . We are persuaded that the motivating factor test, and not the but-for test, remains the applicable causation standard for claims of discrimination under CFEPA, regardless of the federal precedent established in *Gross* and its progeny.” *Id.*<sup>8</sup> This decision demonstrates that the Appellate Court has taken a major step in the

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The decision in this case was coincidentally issued, not “officially released,” on June 30, 2022, the same date this decision is to be filed.

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See also *Harmon v. University of Connecticut*, Superior Court, judicial district of

direction of fully establishing the motivating factor test as the applicable standard, absent legislative change.

This court has also previously rejected an invitation to apply the “but for” test from *Gross* to a § 19a-532 claim,<sup>9</sup> in *Gonska v. Highland View Manor, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-12-6030032-S (June 26, 2014, *Peck, J.*). *Id.* The plaintiff in *Gonska* claimed wrongful termination under § 19a-532, alleging that the reasons given for her termination were merely a pretext for retaliating against her for speaking out against the alleged mishandling of an incident involving a resident at the defendant’s nursing care facility. *Id.* In denying the defendant summary judgment, this court chose not to adopt the “but for” test with respect to the causation element in § 19a-532. *Id.* “Merely because our Supreme Court had once looked to federal precedent to interpret a state statute does not necessitate that the court must thereafter adopt subsequent federal reinterpretation of federal law in lockstep fashion.”

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Hartford, Docket No. CV-15-6056506-S (February 21, 2018, *Shapiro, J.*) (rejecting application of the “but for” standard); *Wagner v. Board of Trustees for Connecticut State University*, Superior Court, judicial district of Hartford, Docket No. CV-08-5023775-S (January 30, 2012, *Peck, J.*) (same); *Weisenbach v. LQ Management*, United States District Court, Docket No. 3:13-cv-01663 (MPS) (D. Conn. September 25, 2015) (same).

<sup>9</sup>

General Statutes § 19a-532 provides in relevant part: “No nursing home facility . . . shall discharge or in any manner discriminate or retaliate against any . . . employee of any nursing home facility or residential care home . . . because such . . . employee . . . has filed any complaint or instituted or caused to be instituted any proceeding under sections 17a-411, 17a-413, 19a-531 to 19a-534, inclusive, 19a-536 to 19a-539, inclusive, 19a-550, 19a-553, 19a-554 or section 19a-562g, or has testified or is about to testify in any such proceeding or because of the exercise by such . . . employee . . . on behalf of himself, herself or others of any right afforded by said sections. . . .”

Id.<sup>10</sup>

Post-Nassar § 31-51m cases

At least two Connecticut district courts have continued to use the “motivating factor” standard in § 31-51m cases. In *Karagozian v. Luxottica Retail North America*, 147 F. Supp. 3d 23, 33 (D. Conn. 2015), the district court stated that “to establish a causal connection under section 31-51m, [the plaintiff] must show that the protected action was a motivating factor for employer retaliation, but not necessarily the only factor.” (Emphasis added; internal quotation marks omitted.) Id. The district court cited to *Gonska and Fasoli v. Stamford*, 64 F. Supp. 3d 285, 296 n.11 (D. Conn. 2014), which in a brief footnote seemingly determined that *Nassar’s* holding was limited to Title VII claims, and that the “motivating factor” standard still applied to speech-related state retaliation claims. A second district court case, *Blue v. New Haven*, Docket No. 3:16-cv-1411 (MPS) (D. Conn. January 31, 2019), also alleged a § 31-51m claim, and applied the motivating factor standard at summary judgment, citing to *Karagozian*.

In the present case, the defendants cite to *Chouhan v. University of Connecticut Health Center*, Superior Court, judicial district of New Britain, Docket No. CV-09-6002439-S (November 5, 2013, *Wiese, J.*), in support of its argument that this

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Interestingly, the Iowa Supreme Court cited to *Gonska* in its comprehensive survey of other states’ caselaw on the causation standard for retaliation claims. *Haskenhoff v. Homeland Energy Solutions, LLC*, 897 N.W.2d 553, 631 (Iowa 2017) (plurality decision). The Iowa Supreme Court rejected *Nassar’s* standard and held that the “motivating factor causation standard” applies to retaliation claims under the Iowa Civil Rights Act (ICRA). Id., 637 (in separate concurrences, *Cady, C.J.*, and *Appel, J.*, agreed to “adopt the motivating factor causation standard” for retaliation claims under ICRA”).

court must apply the “but-for” standard to § 31-51m cases. In *Chouhan*, on a motion to dismiss, the defendant argued that the *Nassar* decision imposed additional pleading requirements to meet the “but for” standard of causation. *Id.* The court, however, stated that this argument was without merit and agreed with the plaintiff that “although *Nassar* imposes a more stringent proof requirement for retaliation claims, it imposes no new or additional pleading requirements.” *Id.*

Accordingly, the court adopts the motivating factor test as the proper standard in Connecticut for determining causation in claims of retaliation.<sup>11</sup>

### **Establishing Causation**

In establishing its prima facie case, the plaintiff can establish causation with either circumstantial evidence, such as showing that the protected activity was followed close in time by the adverse action, or through evidence of retaliatory animus directed against the plaintiff. *Ayantola v. Board of Trustees of Technical Colleges*, 116 Conn. App. 531, 539-40, 976 A.2d 784 (2009). “There is no bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between [protected activity] and an allegedly retaliatory action. . . . The

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The plaintiff filed a notice of additional authority on June 20, 2022 (#355.00), maintaining that while “motivating factor” is the correct standard to apply, if the court chooses to apply the “but for” standard, the plaintiff still prevails because the United States Supreme Court made clear in *Bostock v. Clayton County*, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020) that there can be multiple but-for causes for an employment decision. In the present case, since the court is applying the motivating factor standard, the court will not address *Bostock’s* application of the “but for” standard. The court notes, however, that even if it chose to apply the “but for” standard, the court would still find that the plaintiff prevails.

trier of fact, using the evidence at its disposal and considering the unique circumstances of each case, is in the best position to make an individualized determination of whether the temporal relationship between an employee's protected activity and an adverse action is causally significant. Likewise, the trier of fact is in the best position to determine whether the employer acted with a retaliatory animus." (Citation omitted; internal quotation marks omitted.) *Id.* "Where there are longer gaps in time between protected activity and adverse employment action, the inference of causation may be inferred from the fact that the employer was waiting for the opportune time to retaliate." (Internal quotation marks omitted.) *Buonocore v. Yale University*, Superior Court, judicial district of New Haven, Docket No. CV-18-6077098-S (October 15, 2019, *Wilson, J.*).<sup>12</sup>

"[T]he sequence, timing and nature of events" may establish the causal connection, even where a chain of events occurred over the course of years. *Mullins v. New York*, 626 F.3d 47, 54 (2d Cir. 2010); see also *Martinez v. Connecticut Dept. of Correction*, 125 F. Supp. 3d 397, 424 (D. Conn. 2015) ("Given that the plaintiff is alleging a string of retaliatory incidents over the course of that year . . . it would not be unreasonable for a fact-finder to view the later incidents as temporally related to the [plaintiff's] . . . complaint, even though the timing of any single one of the later

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See also *Ortiz-Martinez v. C&S Wholesale Grocers, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-17-6074533-S (July 2, 2018, *Peck, J.T.R.*) ("Connecticut courts have generally been flexible in their interpretation of temporal proximity"); *Vale v. New Haven*, *supra*, 197 F. Supp. 3d 405 ("[c]ourts may exercise their judgment about the permissible inferences to be drawn from temporal proximity in the context of a particular case").

incidents, viewed in isolation, might not reasonably permit an inference of causation.”).

In *Arnone v. Enfield*, in moving to set aside the jury’s verdict, the defendant argued that there was insufficient evidence to support the jury’s finding of a causal connection.

*Arnone v. Enfield*, Superior Court, judicial district of Hartford, Docket No.

CV-96-0558333-S (July 23, 2001, *Beach, J.*), *aff’d*, 79 Conn. App. 501, 831 A.2d 260,

cert. denied, 266 Conn. 932, 837 A.2d 804 (2003). In denying the defendant’s motion,

the court stated that “[a]lthough the temporal connection between [the plaintiff’s]

complaint and the disciplinary actions is not particularly strong . . . one must also

consider that he was terminated only approximately fifteen months after the complaint

was made, and at least three incidents intervened. . . . I do not find that the causal

connection is so lacking in the evidence as to justify the setting aside of the verdict.”

(Emphasis added.) *Id.*

Temporal proximity constitutes circumstantial evidence in support of causation

as between the acts of whistleblowing and the decision to not to reappoint the plaintiff

as an APIR on May 20, 2011. In the present case, temporal proximity is demonstrated

by a continuous series of events commencing in the spring 2010 that led to the

plaintiff’s virtually inevitable nonreappointment as an APIR in May 2011. Starting in

May and June of 2020, with the nonreappointment of the plaintiff as IA Director, and

following throughout the Step 1 Grievance process, the plaintiff’s labor, IRB and

nepotism complaints were in the forefront of issues before Dean Earley in November,

2010 to December 2, 2010, when Dean Earley and Klein caused UCONN’s response to

be issued denying the plaintiff’s grievance. Given all the facts and circumstances as

previously found in this case, the plaintiff has proved that temporal proximity exists between his whistleblowing complaints and the defendants' retaliatory act, where the defendants did not renew his APIR appointment on May 20, 2011, which serves as circumstantial evidence on the issue of causation.

**B. Non-Retaliatory Reasons for Termination**

The defendants argue that they have produced evidence of legitimate nonretaliatory reasons for not renewing the plaintiff as an APIR in spring of 2011. See *Arnone v. Enfield*, supra, 79 Conn. App. 507. As previously detailed in this memorandum, the defendants have stated several shifting reasons for the plaintiff's nonreappointment as an APIR for the 2011-2012 academic year. The following is a summary of these reasons gleaned from the evidence at trial:

1. No budget line/absence of a budget line for the APIR position per Dean Earley; given no budget line, no opportunity or ability to even consider reappointing the plaintiff to APIR position.
2. There was a hiring freeze in spring 2011, resulting in hiring being limited to positions of critical need. The courses plaintiff was tentatively scheduled to teach in the 2011-2012 academic year were not required courses [they were electives], not of as high a priority, and could be covered by existing faculty. This was stated by Bull in the Step 2 Grievance decision of August 18, 2011, which was later determined to contain faulty information, the source of which was an unidentified source in the School of Business. See Plaintiff's Exhibit 56.
3. The APIR position that the plaintiff held from 2010-2011 was done as a

special circumstance in order to provide the plaintiff (and other faculty in Director and APIR positions) assurance of employment in the Fall while the new competitive search process directed by the Provost's office for the various Director positions was completed; it was a temporary measure, through the use of discretionary funds as a one-time, one-year exception.

4. The IA Director and APIR appointments were one conjoined position, with a single job description and one annual salary.

a. The plaintiff was not initially hired strictly as an APIR. The nature of his original appointment at UCONN was different than that of an in-residence faculty member.

b. The plaintiff accepted the APIR appointment for the 2010-2011 academic year on June 8, 2010.

c. The plaintiff was not reappointed to the IA Director position in July 2010.

5. The Provost's Office provided a special dispensation to use UCONN's General Funds to fund the plaintiff's APIR position for 2010-2011. In May 2011, the Provost's Office did not provide a second special dispensation to use UCONN's General Funds for the sole APIR position.

6. There was no long-term funding or opportunity to continue the plaintiff's appointment strictly as an APIR beyond the 2010-2011 appointment end-date.

7. There was no need in the Management Department for someone with his skills and expertise in entrepreneurship.

### C. Pretext

“To prove pretext, the plaintiff may show by a preponderance of the evidence that [the defendant’s] reason is not worthy of belief or that more likely than not it is not a true reason or the only true reason for [the defendant’s] decision to [terminate the plaintiff] . . . .” (Internal quotation marks omitted.) *Taing v. CAMRAC, LLC*, 189 Conn. App. 23, 28, 206 A.3d 194 (2019).<sup>13</sup> “[P]retext may be demonstrated either by reliance on the evidence comprising the prima facie case or by demonstrating such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer’s proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.” *DeMoss v. Board of Education*, 21 F. Supp.3d 154, 169 (D. Conn. 2014). The trier of fact may also find pretext when an employer offers inconsistent or shifting explanations. *Kwan v. Andalex Group, LLC*, 737 F.3d 834, 846 (2d Cir. 2013); *Byrnie v. Cromwell Board of Education*, 243 F.3d 93, 106 (2d Cir. 2001); see also *EEOC v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2d Cir. 1994) (noting that a juror can reasonably view an employer’s changing explanations as “pretextual, developed over time to counter the evidence suggesting age discrimination”). “[E]vidence establishing the falsity of the legitimate,

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Of note, the Connecticut Appellate Court recently stated that in employment discrimination actions, a plaintiff does not need to produce additional evidence of discriminatory intent beyond that which may be inferred from the plaintiff’s prima facie case, to successfully rebut the defendant’s nondiscriminatory reason and prevail. *Rossova v. Charter Communications, LLC*, 211 Conn. App. 676, 700, 273 A.3d 697 (2022).

nondiscriminatory reasons advanced by the employer may be, in and of itself, enough to support the trier of fact's ultimate finding of [fact]." (Internal quotation marks omitted.) *Jacobs v. General Electric Co.*, 275 Conn. 395, 400-01, 880 A.2d 151 (2005). An employer's "unprecedented . . . deviation from its usual procedure[s]," in conjunction with other evidence in the record, may also allow the trier of fact to conclude that the employer's proffered reasons are pretextual. *Stern v. Trustees of Columbia University*, 131 F.3d 305, 312-14 (2d Cir. 1997). "In order for the procedural irregularity to be probative of the presence of actual discrimination, the [complainant] must also be able to show that the irregularity had a tangible effect on the [decision]." *Craine v. Trinity College*, *supra*, 259 Conn. 642, n. 11.

The direct and circumstantial evidence supports the conclusion that the real reason for the plaintiff's nonreappointment on May 20, 2011, was retaliation.

*1. Dean Earley's lack of credibility throughout his testimony, particularly relating to the reasons he failed to reappoint the plaintiff as an APIR for the 2011-2012 academic year, is circumstantial evidence that the reappointment was in retaliation for whistleblowing.*

Dean Earley, the decision maker in this case, demonstrated a lack of credibility throughout his testimony. His testimony was evasive, inconsistent and simply not worthy of credence on key points. Dean Earley testified on May 4, 5 and 10, 2022. His testimony flipfopped on the question of whether he read the documents submitted by the plaintiff at the grievance hearing, which were referenced in an e-mail from Klein sent to him on November 10, 2010. The e-mail included the notes Klein took at the

November 5, 2010, grievance hearing. The e-mail referenced the documents submitted by the plaintiff which contained extensive information about his whistleblowing complaints relating to labor and IRB issues dating back to March, April, May and June 2010. See Plaintiff's Exhibit 34r. The e-mail explained that copies of the plaintiff's documents were being sent separately to Dean Earley via express mail. See Plaintiff's Exhibit 35.

Dean Earley testified repeatedly on May 4, 2022, that he could not recall the e-mail or the documents. On May 5, 2022, he testified that he could not remember if he received Klein's report or the documents. Later that same day, he testified that presumably he read Klein's e-mail and her attached notes, and when reminded that he signed off on the grievance decision, he said he "would've at least reviewed all of the attachments [he] was provided." On May 10, 2010, after previously testifying that he read all the documents before signing off on the grievance decision, he said he was not aware of the concerns that the plaintiff had raised outside of the School of Business (all of which were sent to him by Klein), and contradicted his May 5, 2022, testimony, by saying he did not remember if he did or did not read Klein's notes or the documents.

Dean Earley was also inconsistent in his testimony about his proposal to Nicholls about changing Dr. Mosakowski's title for SCOPE from Director to Executive Director. On May 4 and 5, 2022, Dean Earley was inconsistent from one day to the next concerning his testimony on the topic of how many course reductions Dr. Mosakowski received as Executive Director of SCOPE.

Dean Earley's testimony that no one made the decision not to reappoint the plaintiff as an APIR in 2011, because there was no budget line and no available long-term funding, was not credible based on other evidence in the case, particularly the testimony of Dino and Nicholls. He later changed his testimony to say that he did not extend an offer to the plaintiff in 2011 because the plaintiff's activities were not a sufficient priority. Also, his testimony that CCEI money could only be used for CCEI was incorrect. Also not credible was Dean Earley's testimony that he was not aware that Mathieu raised issues of nepotism concerning Dr. Mosakowski and that he did not retaliate against Mathieu, Lubatkin, Dino and CCEI after the faculty review committee on which they served voted to deny Dr. Mosakowski a summer grant. In fact, Dean Earley developed a pattern of retaliatory behavior against anyone who crossed swords with wife.

Dean Earley's testimony that he did not recall any complaints of nepotism concerning his wife in 2010 was not credible in the least. At his 2013 deposition, and at trial, Dean Earley's description of a meeting in 2010 with Nicholls, Bull and Rubin concerning issues of nepotism only involved a discussion of general concerns, but nothing specific to him and his wife was not true. The testimony was belied by the Memorandum of Agreement signed on November 16 and 17 by Dean Earley and Dr. Mosakowski, which addressed very specific issues of nepotism impacting Dean Earley's ability to make decisions that financially benefitted Dr. Mosakowski. Dean Earley's testimony that he was never made aware of the plaintiff's complaints made to OACE about the labor, IRB and nepotism issues is also not credible in light of Klein's notes

and other documents from the November 5, 2010 grievance hearing that she had sent to Dean Earley. Included within those documents were e-mails from the plaintiff to Rubin and others outlining the labor and IRB complaints. See Plaintiff's Exhibit 34r. In addition, Rubin testified at her deposition that it was her belief that Dean Earley knew that the plaintiff made a complaint about the IRB issues. It is also not credible that Dean Earley did not know of the plaintiff's complaints based on his own testimony that he presumably read the notes and the documents outlining the complaints because he signed off on the decision denying the Step 1 Grievance on December 2, 2010.

Dean Earley's testimony to the effect that the SCOPE Accelerator, of which Dr. Mosakowski was the Executive Director, was not required to seek IRB approval before conducting interviews with Special Olympics athletes was incorrect. Dean Earley denied both the necessity of obtain IRB approval and the fact that underage Special Olympics students were interviewed. He was proven incorrect on both issues. Dean Earley's testimony was inaccurate or misleading when he testified that no request for funding could have been made to allow the plaintiff to continue as an APIR in 2011-2012 because there was a hiring freeze. This testimony was inconsistent with his April 14, 2011 letter, which said that the hiring freeze would not apply to in-residence teaching positions for APIRs, where an offer had already been approved.

*2. The inherent fallacies associated with the numerous and shifting reasons to not reappoint the plaintiff as an APIR for the 2011-2012 academic year constitutes circumstantial evidence that the reasons stated were pretextual.*

The defendants' counsel repeated in closing that "there was no consideration of renewal solely as an in-residence faculty member and no longterm funding as his position for 2010 and 2011 was funded with special dispensation." In fact, there was a budget line as of April 6, 2011, in the Management Department for the plaintiff. See Exhibit 78.

The defendants also argued that the plaintiff was a temporary employee. Although it is used in the title of a section of the CBA, there is no definition of "temporary" employee in the CBA. That an APIR is listed in the CBA as a temporary position has no bearing on this case except to the extent that it means that the position is not a tenure track position. The CBA agreement simply distinguishes "temporary" employee positions from tenure or tenure-track positions and § 31-51m makes no distinction between temporary and permanent employees. The position of APIR is more accurately described as an annually renewable position depending on job performance and the availability of funding. Although there was no guarantee of renewal, the longstanding custom and practice at UCONN was that APIRs would be renewed based on good performance and availability of funding.

The plaintiff's four renewable contracts with UCONN do not refer to him as a temporary employee. Also, based on findings of fact previously made, particularly with respect to the credibility of Dean Earley on the issue of funding for the plaintiff's APIR position, the court is not persuaded that there was anything unique about the way the APIR position, as it was renewed on June 3, 2010 for the 2010-2011 academic year, was funded. In January 2011, as evidenced within Plaintiff's Exhibit 45, it was noted that

there would be savings in the budget due to the nonrenewal of the plaintiff and two others for the academic year 2011-2012.

The defendants argued that the nonreappointment of the plaintiff as an APIR is a direct consequence, or directly flowed, from his not having been reappointed as IA Director in July, 2010. If this was the case, it makes no sense that the defendants did not tell him that well before May, 2011. His APIR reappointment letter in June, 2010 for the 2010-2011 academic year said nothing of this as a possibility. There is nothing in that reappointment letter that makes reappointment or eligibility for continued reappointment dependent on the plaintiff being reappointed as IA Director. That is, there was nothing about that particular renewal that limited UCONN's ability to renew it for subsequent years. Further, if the nonreappointment of the plaintiff as an APIR was a direct consequence of the nonreappointment as IA Director, then it is not credible that Dean Earley did not understand that his July 28, 2010 decision would be determinative of the future of the plaintiff's employment at UCONN. The defendants' counsel also argued that, "It is not retaliatory to not continue someone in a position he was not hired for originally." This statement makes no sense. The plaintiff was hired as an APIR and IA Director originally. See Defendants' Exhibit B. Finally, the evidence from several administrators, particularly Dino and Klein, unequivocally support the fact that there was no limit to the number of times that an APIR reappointment could be made as long as the longstanding conditions of available funding and performance were met.

Although the testimony of Klein and the testimony and actions of Nancy Bull, reflected in the Step 2 Grievance decision of August 18, 2011, suggests the inevitability

of the plaintiff losing his APIR appointment once he was not reappointed as IA Director, there is no explanation why the plaintiff was never told that once he lost the IA directorship, he was at risk of losing his employment entirely. See Plaintiff's Exhibit 56. His June 3, 2010 reappointment letter for the 2010-2011 APIR position with similar conditions as the previous three letters, affords him no hint of this. As evidenced by Plaintiff's Exhibit 45, although the decision to cut his APIR position from the budget was made in January 2011, the plaintiff received no notice until the May 20, 2011 letter from Dean Earley.

Further, following the November 20, 2010 grievance hearing it is indisputable that Dean Earley knew of all of the plaintiff's whistleblowing claims. In November 2010, he and his wife, Dr. Mosakowski, were required to enter into an extraordinary agreement, effective November 22, 2010, limiting their professional interactions within the School of Business, due to previous acts of nepotism by Dean Earley favoring his wife, which had serious implications for others within the School of Business. This was far more than a slap on the wrist for Dean Earley and may well have influenced his decision to leave UCONN in September 2011. On December 2, 2010, he presumably signed off on the denial of the plaintiff's Step 1 Grievance denying retaliation. Some time before January 21, 2011, the decision was made to cut the plaintiff's APIR position from the budget. The plaintiff was not informed that he lost his position until May 20, 2011, when he received Dean Earley's nonreappointment letter. To make the deception worse, Dean Earley sent an e-mail to faculty on April 14, 2011, which in part reassures APIRs that their positions will not be cut. Dean Earley made this decision, despite his

blatantly false testimony that there was no decision to be made because there was no budget line for the plaintiff. The falsity of this statement is underlined by the deposition testimony of Provost Nicholls, who testified that money is essentially fungible, and easily moved from one account to another within the School of Business, including CCEI.

At her deposition, Bull could not adequately explain the basis for her finding that there was no retaliation. In fact, she stated, that retaliation may or may not have been a variable in Dean Earley's decision.

To the extent that the APIR reappointment for the 2011-2012 academic year was dependent on good performance, available funding and relevance to the academic mission, those conditions were met. The plaintiff had a consistent record of good performance and the evidence revealed that funding was available for APIRs in the Management Department and the School of Business as of May 20, 2011, the date of the letter informing the plaintiff that he would not be reappointed as an APIR for 2011-2012. To the extent that relevance to the academic mission was also required, the evidence revealed that there was a need for faculty to teach required courses for the 2011-2012 academic year and seven courses had already been scheduled for the plaintiff as of May 20, 2011. It is not credible that the decision to not reappoint the plaintiff as an APIR in the 2011-2012 academic year was either for financial reasons or based on the courses he would teach. There has been no rational or credible explanation proffered by Dean Earley, who was the decision maker, for not reappointing the plaintiff, which supports an inference that the motivating reason for the plaintiff's

nonrenewal was retaliation for whistleblowing in violation of § 31-51m.

The court finds that the foregoing proffered reasons by the defendants are not worthy of credence and, therefore, are pretextual.

*3. The defendants' failures to follow their own longstanding policies and procedures constitutes circumstantial evidence that caused the the plaintiff to lose his employment.*

The defendants' failure to follow established procedure is also circumstantial evidence that the stated reasons for his nonreappointment were pretextual and the real reason was retaliation by Dean Earley for the plaintiff's whistleblowing complaints originally made in the spring 2010 and restated in his e-mails and grievances filed in September 10, 2010, regarding the loss of the IA Director position, and on May 31, 2011, upon the loss of his APIR reappointment.

Dean Earley did not consult with the head of the Management Department before issuing his nonreappointment letter to the plaintiff on May 20, 2011.

Senior members of the School of Business and the university administration, including Dean Earley, Klein, Rubin, Nicholls and Bull ignored their responsibility under the UCONN Code of Conduct and the State of Code of Ethics, and the nonretaliation provisions contained therein, by failing to protect the plaintiff as a whistleblower. These failures are circumstantial evidence of retaliation. Despite the mandate of the OACE to investigate whistleblowing retaliation complaints, Rubin referred the plaintiff to the CHRO, to investigate his retaliation complaint. This suggests that Rubin had no confidence that the OACE could effectively investigate his complaint from within the university, yet for some reason she did not refer the matter to

the State Board of Ethics, which does have enforcement authority. Since Dean Earley was the subject of the plaintiff's retaliation complaint stated in his Step 1 Grievance arising out of Dean Earley's failure to reappoint him as IA Director, it was improper for Dean Earley to be the decision maker on the grievance. Given these circumstances, the court concludes that UCONN turn a blind eye to the plaintiff's claims of whistleblowing and retaliation and, in so doing, violated its own policies, which ultimately resulted in the plaintiff's loss of employment.

Finally, there is no rational explanation other than retaliation to explain why the plaintiff was not appointed as an APIR. By all accounts, from his then past and current department heads, Mathieu and Hussein, his former supervisor as IA Director, Dino, student evaluations, the plaintiff excelled as IA Director and as an APIR. He was consistently found to be an excellent mentor and teacher, and employee, whose performance exceeded the requirements of the positions he held including publication in a refereed journal.

For all these reasons, the court concludes that the plaintiff has proven by a preponderance of the evidence that he was not reappointed as an APIR for the 2011-2012 academic year due to retaliation for whistleblowing, and that the reasons given by the defendants were all pretextual. Accordingly, based on a preponderance of the evidence, the court finds that the plaintiff has proved that § 31-51m was violated by the defendants, and is therefore entitled to the relief provided in the statute.

## DAMAGES

In support of his prayer for relief, and in accordance with § 31-51m, the plaintiff claims reinstatement of his position as an APIR, payment of back wages, and reestablishment of employee benefits to which he would have been entitled had he not been subjected to retaliatory nonreappointment to his position, attorney's fees and costs.

### Reinstatement

"Reinstatement is the preferred remedy in employment discrimination cases. See *Serricchio v. Wachovia Sec. LLC*, 658 F.3d 169, 193 (2d Cir. 2011) ('[O]ur Circuit favors reinstatement as a remedy in employment cases generally. '); *Reiter v. MTA N.Y.C. Transit Auth[ority]*, 457 F.3d 224, 230 (2d Cir. 2006) ('Under Title VII, the best choice is to reinstate the plaintiff, because this accomplishes the dual goals of providing make-whole relief for a prevailing plaintiff and deterring future unlawful conduct'). Reinstatement and back pay 'involve the least amount of uncertainty because, in effect, they reestablish the prior employment relationship between the parties[.]'" *Vera v. Alstom Power, Inc.*, 189 F. Supp. 3d 360, 390 (D. Conn. 2016).

"The Second Circuit has recognized, however, that reinstatement is not always feasible . . . because animosity may impede the resumption of a reasonable employer-employee relationship. . . . For example, a district court properly awarded front pay in lieu of reinstatement where ample evidence showed that the employer had exhibited hostility and outrage in response to the plaintiff's age discrimination claim, the plaintiff would be ostracized and excluded[,], and there was no justification for [the employer]'s hostile attitude and vengefulness. . . . However, the natural antagonism that results from

litigating discrimination and retaliation claims should not bar reinstatement.” (Citations omitted; internal quotation marks omitted.) *Vera v. Alstom Power, Inc.*, supra, 189 F. Supp. 3d 390-91. But see *Barry v. Posi-Seal International*, 36 Conn. App. 1, 17, 647 A.2d 1031 (1994) (“An award of front pay damages cannot be permitted as a proper measure of recovery in a wrongful termination action founded on a contract theory. Such a result would violate principles of contract damages and would defy common sense.”)

In *Vera*, the district court reinstated the plaintiff after finding that there were not sufficient circumstances to warrant a departure from the preference for reinstatement. *Id.*, 391. The court explained that it had not observed unusual hostility over the course of litigation, and there was no evidence of hostility prior to the plaintiff’s termination. *Id.* Further, in *Vera*, the court found that there was a low risk of hostility upon reinstatement because the plaintiff would no longer be working directly with the people who made the decision to terminate her employment. *Id.* In *Vera*, the plaintiff’s employment was terminated in June, 2011, and the court decided the case five years later in May, 2016.

Comparatively, in *Perez v. Progenics Pharmaceuticals, Inc.*, 204 F. Supp. 3d 528, 550-51 (S.D.N.Y. 2016), appeal withdrawn, United States Court of Appeals, Docket No. 16-3544 (L) (2d Cir. January 19, 2017), the court observed sufficient animosity between the parties that reinstatement would be impossible and proceeded to award front pay. The court explained that “[w]ith reinstatement not feasible, the Court considers whether Defendant should pay Plaintiff front pay in order to make him whole

for the damage it caused him by terminating his employment . . . in a case where the Court believes that [p]laintiff has no reasonable prospect of obtaining comparable alternative employment.” (Internal quotation marks omitted.) Id., 551. “Denial of reinstatement in those situations, without an award of reasonable, offsetting compensation, would leave the plaintiff irreparably harmed in the future by the employer’s discriminatory discharge, and would permit the defendant’s liability for its unlawful action to end at the time of judgment. To prevent this injustice a reasonable monetary award of front pay is necessary as equitable relief . . . appropriate to effectuate the purposes of [the Act].” (Internal quotation marks omitted.) Id. The court went on to explain that “when calculating front pay, the Court should assume, absent evidence to the contrary, that the illegally discharged employee would have continued working for the employer until he or she reached normal retirement age.” (Internal quotation marks omitted.) Id.

In the present case, there has been no evidence presented to suggest that reinstatement is not practical. In fact, several of the faculty who supervised the plaintiff and praised his performance, including Mathieu and Dino, are still in the Management Department. Dean Earley and Dr. Mosakowski left UCONN in September 2011, shortly after the plaintiff’s last appointment expired on August 22, 2011. Klein is no longer the Associate Dean of the School of Business and Rubin is no longer associated with the OACE and has a completely different assignment within the university. Therefore, the court knows of no impediment to reinstatement.

### Back Wages and Lost Benefits

“One wrongfully terminated is entitled to any loss of income caused thereby. The end of employment and its concomitant loss of income may result in a recoverable economic loss. . . . A terminated employee must mitigate such loss by a reasonable effort to find substantially equivalent employment. . . . Proof of a failure to mitigate falls to defendant. . . . A claimant is entitled to be reimbursed for any loss caused by the unlawful employment action of defendant. Back pay is ordinarily measured by the difference between the wages that would have been earned but for defendants’ wrongful action and what was actually earned together with what was earnable with reasonable diligence.” (Citations omitted; internal quotation marks omitted.) *Truskoski v. ESPN, Inc.*, 823 F. Supp. 1007, 1014-15 (D. Conn. 1993).

The plaintiff testified that his 2010-2011 APIR appointment terminated on August 22, 2011. Because he was not notified that the position would not be renewed until May 20, 2011, it was too late for him to seek an academic position for the 2011-2012 academic year. On June 29, 2012, he was appointed to a part-time temporary position as a lecturer (Strategy and Marketing), at the United States Coast Guard Academy, for thirty-two hours per week for the 2012-2013 academic year, which was eventually extended by a series of one year appointments for three more years, for a total of four years, until 2016. After one year, he was eligible to enroll in the Federal Employees Health benefit program, but was required to pay both the employee and the Government shares of the premiums.

As an APIR at UCONN, the plaintiff had health benefits, a 403B retirement account that had a an 8 percent match by the university, a 457 deferred compensation plan and other benefits. At the end of two years, at the Coast Guard Academy, at age sixty-two, he started looking for other employment because he was unsure of the possibility of future appointments due to Civil Service rules. He was unable to find other work in academia.

The court finds that the plaintiff is entitled to back pay from 2011-2016, in the form of the differential between the pay he received from the Coast Guard Academy and the pay he would have received had he not been wrongfully non-reappointed as an APIR on May 20, 2011. This is so despite the fact that his employment at UCONN was based on a contract subject to renewal as APIR on an annual basis. He was not a temporary employee within the meaning of the CBA or based on the usual meaning of that term, in that renewal of his employment on an annual basis could have continued indefinitely subject to performance, funding and relevance to the academic mission.

The court has settled on the foregoing five-year period for a back pay award for several reasons: (1) There is evidence that plaintiff mitigated his damages by working for the Coast Guard Academy in an academic position during this period of time, thereby demonstrating his desire to continue work through 2016. (2) The plaintiff testified that he really enjoyed his work at UCONN and wanted to continue there. The plaintiff and other witnesses testified about one faculty member, Kathy Dechant, an APIR at UCONN, who received yearly renewable appointments for twenty years. (3) Other evidence established that it was common for APIRs to be renewed for a period of

years as long as they sought reappointment and met the requirements of good performance and funding. (4) When the plaintiff was hired by Dino, he was assured that he would be able to stay at UCONN as long as he met the requirements in the appointment letter regarding performance and funding, which in his last reappointment letter on June 3, 2010, was expanded to include relevance to the academic mission. (5) APIR reappointments were commonplace and, although they were subject to annual reappointment, in practice, they were regarded as automatic. As a matter of fact, in an e-mail dated June 22, 2010, from Assistant Provost Bull, to Dean Earley, the plaintiff, Dino, Mathieu, Klein, and Bull used the phrase “automatically renew” in reference to one such yearly renewable contract for the plaintiff. See Plaintiff’s Exhibit 24, pp. 3-4. (6) The plaintiff had an excellent performance record at UCONN, which earned him high praise from his peers including, Dino, Mathieu, Hussein, and even Earley, at the July 19, 2010 meeting. The plaintiff also received a 2009-2010 Mentor of the Year Award from the School of Business CCEI-IA. See Plaintiff’s Exhibits 11, 13, 23, 73. The UCONN Undergraduate Catalog, 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2015-2016, 2016-2017, 2017-2018, 2018-2019, 2019-2020 and 2020-2021, all indicate that the courses taught by the plaintiff as an APIR are still being offered.

In cases projecting damage awards for lost income in employment, “[r]easonable certainty of proof is all that is required, and mere uncertainty as to the amount of lost profits may be dispelled by the same degree of proof as is required in other civil actions, that is, the amount may be determined approximately upon reasonable inferences and estimates.” (Internal quotation marks omitted.) *Torosyan v. Boehringer Ingelheim*

*Pharmaceuticals, Inc.*, 234 Conn. 1, 33, 662 A.2d 89 (1995). Based on all the evidence presented on the quality of the plaintiff's performance, the fungibility of funding within the School of Business, and the tradition and practice of renewing APIRs upon performance and funding, a reasonable inference may be drawn that the plaintiff's employment as an APIR would have continued for a period of years, if it was not wrongfully cut short by the retaliatory action of Dean Earley.

#### Mitigation of Damages

"An employer may avoid a back pay award . . . if it demonstrates that the plaintiff failed to mitigate . . . damages. . . . This may be done by establishing (1) that suitable work existed, and (2) that the employee did not make reasonable efforts to obtain it. . . . But an employer is released from the duty to establish the availability of comparable employment if it can prove that the employee made no reasonable efforts to seek such employment. . . . *The employer bears the burden to show that the plaintiff did not make reasonable efforts to seek alternative employment.* . . . In determining whether the employer met that burden, the Court asks whether the plaintiff use[d] reasonable diligence in finding other suitable employment, which need not be comparable to their previous positions. . . . The ultimate question is whether the plaintiff acted reasonably in attempting to gain other employment or in rejecting proffered employment. . . . This obligation is not onerous and does not require [the plaintiff] to be successful."

(Citations omitted; emphasis added; internal quotation marks omitted.) *Vera v. Alstom Power, Inc.*, supra, 189 F. Supp. 3d 384-85; see also *Rossova v. Charter*

*Communications, LLC*, 211 Conn. App. 676, 703, 273 A.3d 697 (2022) ("[a]n employer

seeking to reduce or avoid a back pay award bears the burden of demonstrating that a plaintiff has failed to satisfy the duty to mitigate” [internal quotation marks omitted]).

The court finds that the defendants have not met their burden of demonstrating that the plaintiff has failed to mitigate his damages through 2016. There has been no evidence presented to the court establishing (1) that other suitable work existed beyond his part-time position as an instructor at the Coast Guard Academy, and (2) that the plaintiff did not make reasonable efforts to obtain it. Although the court is not awarding damages for years after 2016, for reasons apart from the failure to mitigate, the court notes that the plaintiff has provided no evidence of mitigation after 2016. Beyond 2016, the plaintiff has not produced evidence of either mitigation, employment or income. Thus, the court has awarded no back wages for this period. See Plaintiff’s Exhibits 70-71.

#### Expert Testimony on Damages

In support of the opinions offered by Dr. Wright, the court finds that he has testified in numerous cases as an expert witness in evaluating economic damages for past and future losses of wages and benefits, as set forth in his report. He is currently professor of economics emeritus at the UCONN, and was employed as a professor of economics there from 1979 through August, 2001, where he also served two five-year terms (1979-1989) as Head of the Economics Department. His opinions have been widely accepted by judges of the Superior Court throughout the state in employment and other cases. The court finds that there a strong foundation for the back wages and lost benefits determined by Dr. Wright for the years 2012-2016, and is persuaded by his

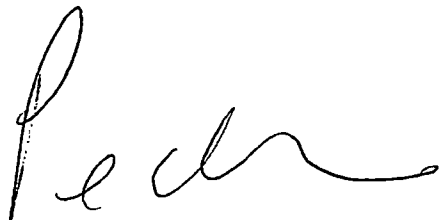
analysis and conclusions for the time period of 2012 to 2016.

The defendants, relying on *Connecticut Judicial Branch v. Gilbert*, 343 Conn. 90, 119, 272 A.3d 603, 622 (2022), argue in their posttrial brief that the statutory waiver of sovereign immunity for “back wages” in § 31-51m is limited to wages as the State did not unambiguously waive its sovereign immunity under § 31-51m to permit interest or “grossing-up” of damages. In *Gilbert*, our Supreme Court held “that the award of interest is subject to special treatment for purposes of sovereign immunity, and . . . the state’s waiver of sovereign immunity as to liability for civil rights violations under [General Statutes] §§ 46a-58 (a) and 46a-60 and as to back pay and damages under [General Statutes] § 46a-86 (b) and (c) does not constitute a waiver of immunity as to interest on such awards.” *Id.*, 120. Further, *Gilbert* held that “statutes by which the state purportedly waives its sovereign immunity must be narrowly construed.” *Id.*, 119 n.18.

Although Dr. Wright’s report included calculations and a formula for grossing up the plaintiff’s damages to account for taxes, the court agrees with the defendants that since there is no specific provision for this in § 31-51m, and because waivers of sovereign immunity must be read narrowly, the court is precluded from enhancing the back wages by grossing up the actual total for taxes. See also *Hicks v. State*, 297 Conn. 798, 1 A.3d 39 (2010); *Struckman v. Burns*, 205 Conn. 542, 534 A.2d 888 (1987).

For the foregoing reasons, the court hereby enters judgement in favor of the plaintiff and awards the plaintiff relief for the defendants’ violations of § 31-51m as follows: reinstatement as an APIR in the Management Department of the UCONN

School of Business; back wages and reestablishment of benefits for five years for the academic year commencing with the academic year 2011-2012, through the academic year of 2015-2016, less income earned in mitigation of those damages, for a total award of damages of \$735,867. The plaintiff is also entitled to attorney's fees, and expenses in accordance with the § 31-51m and Practice Book § 11-18.

  
\_\_\_\_\_, JTR  
Peck

## Checklist for Clerk

**Docket Number:** HHD11-6027112

**Case Name:** Weinstein v. University

**Memorandum of Decision dated:** 6/30/2022

**File Sealed:** Yes No X

**Memo Sealed:** Yes No X

**This Memorandum of Decision may be released to the Reporter of Judicial Decisions for Publication** XXXX

**This Memorandum of Decision may NOT be released to the Reporter of Judicial Decisions for Publication**

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HARTFORD J.D.



# State of Connecticut Judicial Branch Superior Court Case Look-up



Superior Court Case Look-up  
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Small Claims

HHD-CV11-  
6027112-S

WEINSTEIN, LUKE v. UNIVERSITY OF CONNECTICUT Et Al

Prefix: HD4

Case Type: T90

File Date: 11/23/2011

Return Date: 12/20/2011

[Case Detail](#) [Notices](#) [History](#) [Scheduled Court Dates](#) [E-Services Login](#) [Screen Section Help](#) [Exhibits](#)

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Calendar Notices

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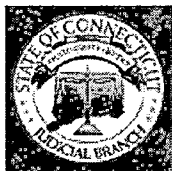
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## Case Information

Case Type: T90 - Torts - All other

Court Location: HARTFORD JD

List Type: No List Type

Trial List Claim:

Last Action Date: 06/24/2022 (The "last action date" is the date the information was entered in the system)

## Disposition Information

Disposition Date:

Disposition:

Judge or Magistrate:

## Party & Appearance Information

Party

No  
Fee  
Category  
Party

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File Date: 03/31/2022

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File Date: 12/09/2011

Defendant

## Viewing Documents on Civil, Housing and Small Claims Cases:

If there is an in front of the docket number at the top of this page, then the file is electronic (paperless).

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